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January 3, 1994

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.c. 20554

RE: **Ex Parte Presentation in MM Docket 92-266**

Dear Mr. Caton:

Pursuant to 47 CFR § 1.1206(1), the undersigned submits this original and one copy of a letter disclosing a written ex parte presentation.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

John W. Pestle

JWP/kel

cc: Mr. Steven Weingarten (w/encl.)
Chron file (w/encl.)

MEMO

TO: Steve Weingarden

FROM: John Pestle

RE: Form 393 and Related Items

DATE: December 29, 1993

Thank you for the opportunity to provide comments on Form 393's and related matters where you indicated the Commission staff is gathering comments to help make policy recommendations. I apologize in advance if this is a little disjointed but I am typing it while traveling on vacation with my family. I'm using my wife's laptop--hence the cover sheet.

Background: Our firm represents over 200 Michigan communities on cable rate regulation matters. This is an outgrowth of our traditional utility and municipal practice--I am the Co-Chair of our Energy and Telecommunications Practice Group. The other Co-Chair is a former chairman of the Michigan Public Service Commission. We represent many of the smaller entities in the utility business (large industrial customers and the like).

Among these are municipalities and municipally owed electric, cable, water, steam and solid waste utilities. This is a part of our traditional municipal practice--we are City Attorney (or equivalent) for many municipalities. We represent many municipalities throughout the state on specialty matters (bond counsel, labor counsel, utility counsel, etc.). I am a past Chair of the municipal lawyers section of the State Bar of Michigan.

Cable rate regulation thus fits nicely with our existing clientele and practice. And we have extensive experience on how municipalities of all sizes actually operate. The comments below in part reflect this.

30-Day Deadline: The Form 393 has been a trap for the unwary due to the 30 day deadline in which to take action (or else the rates have been approved by default). The deadline may make sense in future years when (hopefully) increases are minimal and non-controversial. It makes less sense for the first year when communities are learning a totally new set of procedures and setting base rates that may be in effect for a long time--3, 5, 7 or 10 years--such that a municipality inadvertently missing the 30 day deadline may have major long term repercussions for its residents.

This is not a theoretical issue--We have been approached by several good-sized communities (who we had not represented previously on cable matters) to review their Form 393, and on asking found that more than 30 days had passed since they received it and no tolling order had been issued. They were unaware of the need to act in 30 days.

We are aware that in the past cable operators have been persistent and successful in getting the Commission to extend deadlines, especially in new areas. The municipalities that need an extension here the most are unaware they need it and have no idea how to contact you.

Action by the Commission to extend the 30 days on a one time basis to the later of February 15 or 60 days after receipt of the form where basic cable rates are being regulated for the first time would be very helpful.

Require Use of Commission Form: A related aid would be to require all cable operators to use the Commission's actual Form 393 in their submissions. We have seen a wide variety of claimed Form 393 submissions. Few use the Commission's form. As a result the communities (and sometimes we) have a hard time on telling for sure if they are for basic service or cable programming service (see the comment on the TCI system below) because the requisite boxes are in different places and the like.

Most operators are using spreadsheets that produce a series of tables that only somewhat resemble the Commission's Form. This makes the review difficult.

And the instructions are almost always deleted--This makes it extremely difficult for a community (without outside assistance) to review the data and determine if even the most basic items were filled out correctly.

This sounds like a minor item but would be very helpful. It goes to the basic integrity of the process.

Legends on Basic Form 393: Relatedly we suggest that there be a separate cover page solely for the Form 393 for basic cable service. It should state in large (e.g.--30 point bold) type"Basic Cable Service--YOU WILL HAVE AUTOMATICALLY APPROVED THESE RATES UNLESS YOU ISSUE A TOLLING ORDER 30 DAYS FROM YOUR RECEIPT OF THIS FORM.--See 47 CFR Section ____" This makes the form more "municipality friendly" and prevents the current guessing games as to whether it is for basic or not and puts the municipality on notice of what inaction will lead to.

Let me give you an example of why the preceding changes are needed: One of our clients received a cable programming service Form 393 from TCI but no form for basic. They called TCI who said "we checked the wrong box--you should know it's for basic." The municipality disagreed but as a protective measure had to treat this as a basic Form 393.

The preceding suggestions will help prevent these types of problems.

Failures to File: We have seen consistent patterns of failures to file Form 393's. TCI has simply failed to file basic cable service forms within 30 days of becoming subject to rate regulation in medium sized and smaller communities. In about 90 percent of these cases communities whom we represent who are served by TCI either got their Form 393 for basic weeks late or had to call TCI weeks after the Form was due and ask where it is. Only then does it get filed. TCI's chief person for these forms told one of our clients there was no excuse for their being late.

By comparison, we have only one case to date where another cable operator missed the filing deadline.

It appears TCI is simply filing late in smaller communities in the belief they are too small to be able to take any meaningful action in response.

A related pattern--again where TCI to our knowledge so far is the only major violator--is the failure to file 393's with this Commission on a timely basis. Essentially all our clients (without regard to size) who are served by TCI got a cable programming services Form 393 that was called an "amended filing" and in virtually all cases it was filed more than 30 days after the Form 329 was filed with the Commission. In no case have they received the claimed original filing. This appears to be a sham to try to conceal a late filing. As such it directly impacts the integrity of the rate regulation process, at least in the view of the communities.

Note that in all these cases the Form 393 for cable programming services was due on or after November 15, and the "amended" form was received weeks after the date it was due.

The communities are very upset with TCI's deliberately flouting deadlines at the local and Commission level. It contributes to their skepticism as to the integrity of the process and (see end of memo) as to whether this process of rate regulation is meaningful. We have at least 30 cases of missed deadlines for basic service so far--and the deadlines are missed by weeks, not by days.

The communities' views are simple--How can TCI violate the law with impunity? How come if TCI ignores filing deadlines it can claim there are no repercussions, yet if the community misses the 30 day deadline for the tolling order rates are automatically approved?

We have not been able to provide a good answer to this question.

To the communities a key is what this Commission will do with TCI on its late filed cable programming service 393's. To put it (as it has been put to me, and I apologize if this is a little blunt, but it's what I'm being told) they want to see if the Commission basically ignores these violations by TCI and the like, or at most administers a slap on the wrist that has no real impact. If so they will view this as a clear signal that communities should drop the thought of sanctions against TCI for analogous violations at the local level (or any aggressive review of TCI's filings for compliance with the Commission's substantive rules).

But if this Commission takes strong action against TCI for its cable programming service defaults the communities will tend to interpret this to mean that the Commission will enforce the law (which is what the communities want to see). It will tell the communities that they will not be wasting their money if they do the same, and (more importantly) that they will not be wasting their efforts if they carefully examine Form 393's for compliance with the Commission's rules.

Clear Sanctions Needed : From reviewing this with communities, the single biggest thing I can tell you is that there is a clear need for direction from the Commission as to the types of sanctions that can be imposed for failure to timely file. As can you appreciate the normal municipal remedy--a misdemeanor criminal prosecution with a fine of 50 or 500 dollars--is worth little.

The communities are willing to take action, but they need some direction or signal from the Commission that they are not wasting there time doing this. They realistically expect that if they try anything significant that TCI will promptly haul them into court and run up the legal fees until the community surrenders.

The Commission can aid communities in at least two ways. The first is by unequivocally stating that it is the sole forum for appeals of the imposition of sanctions by municipalities. This will remove the lawsuit risk.

Second and substantively, the Commission should rule that the failure to make a timely filing is a waiver by the cable company of its right to elect the benchmark as opposed to the cost of service methodology. To make this effective, the Commission must state that municipalities where the deadline was missed can now require the cable operator to make both a cost of service and benchmark filing and base rates on the lower of the two. To aid this the Commission could rule that if such a filing is ordered within 45 days of the community finding such a default that the time periods (for tolling orders and the like) are reset and start to run only from the date of the new filing by the cable company.

Such an approach would appear to fit within the framework of the current regulatory structure with the least changes.

An alternative would be to reduce the benchmark rate by an additional amount in cases of late filing--Reductions of 10 to 30 percent have been discussed. The latter figure would comport with the 30 per cent figure initially considered by the Commission (but later rejected for general use) based on the number of cable systems actually subject to competition

Data Requests: The Commission also has to address the ability of municipalities to obtain data from the cable operator to verify figures used on the 393, and make corrections if necessary.

The cable regulation ordinance adopted by our municipalities says (in substance) that the City may require the cable operator to produce such documents as the City deems necessary to aid in the rate regulation process. It also provides that it must be construed in accordance with the Commission's rules.

Many cable operators (again, notably TCI) have contended this provision violates the Commission's rules and is illegal. In essence, the position they are taking is that the only data the municipality may get is the Form 393 (or little beyond it). We disagree, but the Commission needs to promptly clarify this for the benefit of communities currently in the rate regulation process.

Such a ruling is essential for the integrity of the process. If we cannot get data from the cable operator to determine if the Form 393 has been filled out correctly, the process is worth little (our clients use stronger words). Does the Commission believe that it has discovery rights when it regulates basic service or cable programming services? If so (which I presume to be the case) municipalities exercising similar authority have the same rights.

I can assure you that given the limited budgets of the municipalities, limited dollar adjustments that are possible on Form 393's and short timeframes within which communities must act that municipalities will not go overboard on this.

As examples, we need discovery in the following types of situations: To check the data underlying equipment, installation and service charges. We are seeing large variations

between cable companies in these numbers, at minimum we need to see the cable company's books. In some cases we think the figures may be being padded to offset decreases (due to the benchmark formula) in programming rates.

In other cases we believe that there has been a decrease in the services actually provided as a part of basic service and that what was formerly provided free as a part of basic is now being charged for separately. A decrease in service is an increase in rates, so the new basic rate has to be reduced to offset the revenues now being received from separate charges. Again, we need access to the cable operator's books to address this.

This is particularly the case when it appears that charges in the past may have been on the books but were rarely in fact imposed (were waived as a matter of course).

In other cases the cable operator is not providing the channels listed on their current rate card. Was the Form 393 filled out with the greater or lesser number of channels? Was a replacement channel a satellite channel or not? Was there a replacement channel or not (our clients seem to tell us no--just a channel with snow)? What was the state of affairs on the date that basic service became subject to rate regulation? We have some situations where a channel is a pay channel part of the day and a cable programming services channel part of they day. To help decide how to treat it we need data from the cable company on the hours it is available for each, number of people taking it (to help avoid shams and phony a la carte channels and the like). Again, the municipality must be able to get data from the cable operator is necessary.

These examples could be multiplied--the preceding are simply ones that come to mind as I sit and type about this, without any of our documents or files.

Impact on Communities: Our cable rate regulation clients are a self-selected group who are all regulating rates. But we have had contact with many communities who are not regulating. The latter communities (and frankly, some of the former) are skeptical about cable rate regulation. They've been told by the cable operators (who in many cases they've known for years) that it's a Washington, lawyer and accountant boondoggle/gravy train that will not lead to reductions because the cable company will comply with the FCC rules anyway.

And they've been told repeatedly that it will cost a lot of money to regulate.

The single biggest thing that will get the "fence-sitting" communities off the dime is if they see communities that have gone forward getting significant rate reductions.

The Commission's actions in this regard are crucial--opinions are still in a formative stage. This will not be the case 6 months or a year from now: The initial message the communities and their citizens get from this Commission is crucial.

So if the Commission takes decisive action that leads to significant rate reductions it will motivate many more communities to regulate. Those that are regulating will become more aggressive.

In this regard, please note that forfeitures--no matter how attractive they appear to the Commission--are a poor remedy because they have no effect on rates. Although I am not

familiar with this Commission's practice, I am skeptical as to whether they equal the dollar benefits (direct and indirect) that cable companies get from violating the rules. Municipalities may not have the authority to impose similar sanctions.

The only action that will be meaningful to the municipalities and to their residents will be actions that have a direct impact on subscriber rates.

Conclusion: I hope these thoughts, literally typed on the fly, are helpful. If you need further information call and leave a message on my voice mail (616-336-6725). Because I am on vacation through New Year's you may wish to speak with Pat Miles, who is one of the other cable lawyers in our group, and to whom I am faxing a copy of this memo.

You can reach Pat or me at Varnum, Riddering, Schmidt & Howlett, Box 352, Grand Rapids, MI, 49501-0352, phone 616-336-6000, fax 616-336-7000.

cc: Pat Miles

Chron file

TCI Cablevision of
Greater Michigan, Inc.

Decmeber 27, 1993

Mr. Dennis Stepke, City Superintendent
CITY OF NORTH MUSKEGON
1502 Ruddiman Drive
North Muskegon, MI 49445

Dear Mr. Stepke:

We have reviewed the rate regulation ordinance prepared by your attorney.

The following portions of your ordinance are inconsistent with the 1992 Cable Act and the FCC's implementing regulation. They are listed in the order in which they appear in your ordinance.

1. In the first section of the Ordinance, the definition of "basic service" does not comport with that contained in the FCC rules. The ordinance has expanded the FCC and Cable Act definition of basic service to include "any other cable television service which is subject to rate regulation by the City pursuant to the Act and the FCC rules".

2. The fourth section of the Ordinance contains information requirements which significantly exceed both in scope and indiscretion that allowed by the FCC rules and the FCC's Report and Order. Specifically, the FCC has strictly limited franchising authorities from requesting information beyond that contained in the Form 393 unless it is necessary to "make a rate determination in those cases where cable operators have submitted initial rates or have proposed increases that exceed the Commission's presumptively reasonable level as defined by our regulations" Report and Order in MM Docket 92-266, FCC 93-177 at § 130 (May 3, 1993). Thus, unless the franchising authority can establish that TCI's rates exceed the highest permissible rate allowed by the FCC, they are strictly limited in their information request. They may not request proprietary information to simply confirm the compliance with the FCC's benchmark rates. Report and Order at § 130. Additionally, the Commission has stated that where the cable operator does comply with the benchmark standards, the franchising authority may only request information that is necessary to "properly document that its prices are in accord with that standard". Report and Order at § 130.

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3. Section 5 of the Ordinance establishes standards and procedures for the treatment of "proprietary" information that are in conflict with the Commission's standards. First, the FCC contemplates the proprietary information may be requested only where the cable operator exceeds the FCC benchmark rate. Report and Order at § 130. Second, the Ordinance's disclosure standard which allows the City to "weigh the policy considerations favoring nondisclosure against the reasons cited for permitting inspection" is inconsistent with the Freedom of Information Act standards incorporated by the FCC in Rule § 76.938. See Report and Order at § 131.

4. Section 6 of the Ordinance provides that after receiving the cable operator's rate material (Form 393), the franchising authority, in setting a meeting to consider the cable operator's submission, need only provide notice by "first class mail at least three days before the meeting". This notice is insufficient to provide "reasonable opportunity for consideration of the views of interested parties" as required by FCC Rule § 76.910 (e) (1). There should be at least seven days notice in this context. Further, the notice periods contained in Sections 8 and 9 of the Ordinance are likewise insufficient and in each instance should be changed to at least 30 days notice for the cable operators.

5. Section 14 of the Ordinance states that "failure of the City to give the notices or to mail copies of reports as required by this Article shall not invalidate the decisions or proceedings of the City Council." This provision is blatantly in conflict with both FCC notice requirements and TCI's constitutional due process rights. At a minimum, FCC rules require franchising authorities to provide a "reasonable opportunity for consideration of the views of interested parties." [FCC Rule § 76.910 (e) (1)]. Further, to the extent TCI relies upon the notice requirements set forth in the franchising authority's rate regulation ordinance, constitutional due process minimums require adherence by the franchising authority.

6. Section 17 of the Ordinance purports to allow any and all remedies and sanctions to be applied against a cable operator for failure to comply with any FCC rule or any order of determination of the City. These remedies purport to include both revocation and nonrenewal of franchises. The FCC rules restrict and preempt such sanctions. Rule § 76.943 provides that any finding that rates are "unreasonable" is not a basis for forfeiture. The FCC's Report and Order states:

> In exercising our authority under Section 623 (b) (5) (a) to establish enforcement guidelines, we do not believe that it is necessary for franchising authorities to utilize punitive sanctions such as fines or forfeitures for violation of rate regulation and we are, therefore, preempting local laws to the extent that they may permit the use of such sanctions.

Report and Order at § 145. Thus, Section 17 of the Ordinance is in direct conflict with FCC Rules.

We have, as you can imagine, spent a great deal of time and resources in understanding the new federal law and FCC regulations pertaining to rates. Our business, at least for the foreseeable future, hinges on that understanding. So, while we recognize the right of the City to regulate, we will be vigilant in insuring that the regulation exercised is in keeping with the law and rules.

With that in mind, we respectfully request that the City review its rate ordinance in light of the information we are providing here and amend its rate ordinance accordingly.

We would be happy to discuss this or any issue with you at your convenience.

Sincerely,

James E Flood

JAMES E. FLOOD
General Manager

JF/sp

VARNUM, RIDDERING, SCHMIDT & HOWLETT
ATTORNEYS AT LAW

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January 3, 1994

Mr. James E. Flood
General Manager
TCI Cablevision of Greater Michigan, Inc.
700 W. Broadway
P.O. Box 978
Muskegon, MI 49443

Re: Rate Regulation Ordinance

Dear Mr. Flood:

We reviewed your letter dated December 27, 1993 to our client, the City of North Muskegon, claiming that the Cable TV Rate Regulation Ordinance ("Ordinance") adopted by the City is not consistent with FCC Rules promulgated under the 1992 Cable Act. We have several comments in response to your letter.

First, we note that your letter is several months too late. The City adopted the ordinance in the fall of 1993. They provided you a copy in advance of its adoption. But you submitted no response of any kind until now.

Second, we disagree that the Ordinance provisions are not consistent with FCC Rules. Your arguments are based upon misinterpretations of FCC Rules or the Ordinance itself, or both. While we do not believe that it is necessary to analyze each of your arguments in detail, we will provide you with the following comments on the items in your letter:

1. Any "other cable service" beyond basic cable service would require amendments to the 1992 Cable Act and the FCC Rules before it could be regulated by the City. Hence, the Ordinance does not purport to expand the scope of regulation beyond what is presently authorized. Instead, it simply recognizes that the City may regulate "other cable services" if so authorized by the Act and FCC Rules in the future.

2. We do not agree that the FCC Rules allow franchising authorities to obtain information only if TCI's rates exceed FCC benchmarks.

3. FCC Rules require franchising authorities to adopt procedures analogous to 47 CFR § 0.459. The disclosure standard contained in the Ordinance is taken directly from FCC Rules (47 CFR § 0.459 and related § 0.457 and § 0.461).

4. The three (3) day and fifteen (15) day periods are more than adequate to provide TCI with reasonable opportunity for consideration of its views in light of certain deadlines applicable to the actions of municipalities in rate regulation.

5. The City intends to comply fully with all procedures, notices, and hearings set forth in the Ordinance. Consistent with due process requirements, FCC Rules, and Michigan law, Section 14 means only that the proceedings of the City will not be invalidated so long as there is substantial compliance with the Ordinance.

6. The FCC did not preempt remedies of franchising authorities for violations of rate orders issued by franchising authorities or for violations of FCC Rules. We note that merely submitting initial or new rates which are later determined to be unreasonable is not a violation of law (See FCC Report and Order in MM Docket 92-266, FCC 93-177 at Paragraph 145) and therefore the mere submission of such rates would not invoke the remedies in Section 17.

Finally, we note that Section 2 of the Ordinance unequivocally provides that the Ordinance must be implemented and interpreted consistent with the 1992 Cable Act and the FCC Rules. Even if there were a present or future conflict between FCC Rules and the Ordinance, the Ordinance would have to be interpreted consistent with the FCC Rules.

In summary, the Ordinance is consistent with the 1992 Cable Act and the FCC Rules.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETT

John W. Pestle

JWP/kel

cc: Mr. Dennis Stepke
City of North Muskegon file
Chron file